IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
November 4, 2008 Session

DEBORAH GAIL DAVIS MORGAN EVERETT v. CHARLES SCOTTY MORGAN

Appeal from the Circuit Court for Monroe County
No. 11132 John B. Hagler, Judge

No. E2007-01491-COA-R3-CV - FILED JANUARY 16, 2009

Deborah Gail Davis Morgan Everett ("Mother") filed a petition seeking to have Charles Scotty Morgan ("Father") held in contempt of court for failure to pay child support. Shortly thereafter, Mother was contacted by George Raudenbush ("Raudenbush") who told Mother that he was connected with the court system and that he had been contacted by Father to mediate Mother's claim for back child support. However, Raudenbush, who was Father's friend, neither was connected to the court system nor was a certified mediator. After Raudenbush convinced Mother to discharge her attorney, Mother, Father, and Raudenbush "mediated" Mother's claim. Raudenbush represented to Mother that the most a court would award her in back child support was $8,750.00. Mother eventually agreed to this amount, even though she was convinced much more was owed. An Agreed Decree was entered by the Trial Court incorporating the terms of the "mediation." Soon thereafter, Mother filed a Tenn. R. Civ. P. 60.02 motion to set aside the Agreed Decree on the basis of fraudulent misrepresentations made by Raudenbush and/or Father. Following a hearing, the Trial Court granted the motion and thereafter determined that Father owed a total of $17,375.00 in arrears. In determining the amount of Father's arrears, the Trial Court credited him with time that the children were living with him even though no petition to modify his child support payment had been filed. Father appeals, claiming the Trial Court erred when it granted Mother's motion to set aside the Agreed Decree. Mother appeals, claiming Father was not entitled to a credit for the time the children were living with him because no petition to modify had been filed. We affirm the Trial Court's judgment setting aside the Agreed Decree pursuant to Tenn. R. Civ. P. 60.02. We further hold that the credit the Trial Court gave to Father was an improper retroactive modification of his child support payment. Mother's judgment against Father is modified to be $26,125.00, plus statutory interest. We remand for further proceedings to award Mother's attorney fees incurred on appeal and the calculation of the statutory interest.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed as Modified; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and CHARLES D. SUSANO, JR., J., joined.

Kevin W. Shepherd, Maryville, Tennessee, for the Appellant, Charles Scotty Morgan.

Peter Alliman, Madisonville, Tennessee, for the Appellee, Deborah Gail Davis Morgan Everett.

OPINION

Background

Mother and Father were divorced several years ago. They have two minor children. The record in this case begins with Mother's petition for contempt and to set child support filed in December of 2005. In this petition, Mother claims that on October 22, 2001, the Trial Court found Father in contempt of court for failure to pay $5,000.00 in child support. At that time, the Trial Court also set Father's child support payment at $150.00 per week. Mother explained that while Father did pay the $5,000.00 thereby purging himself of contempt, he again fell far behind in his child support payments. Mother requested the Trial Court find Father in contempt of court and calculate Father's new child support payment based on current earnings.

On January 19, 2006, Mother's attorney filed a motion to withdraw from the case. One week later, an "Agreed Decree" was submitted to and entered by the Trial Court. When the Agreed Decree was entered, Mother was not actively represented by counsel although the order granting her attorney permission to withdraw had not yet been entered.[1] In any event, according the Agreed Decree, Father was ordered to pay $8,750.00 in arrears and his new child support payment was set at $75.00 per week.

Mother's attorney re-entered the case on April 26, 2006, and soon thereafter Mother filed a motion to set aside the Agreed Decree pursuant to Tenn. R. Civ. P. 60.02(2). Attached to the motion was Mother's affidavit which provides, in relevant part, as follows:

> I filed the original Petition in this matter on December 5, 2005, claiming [Father] owed back child support through December 2, 2005 of $32,550.00.
>
> Within days of the Petition being filed, [Father] began calling me saying he did not owe that much. I told him I was certain he did and I was determined to go to Court about it.
>
> Several days later I received a call from a man who told me his name was George Raudenbush. He told me he [was] a mediator

[1] The Trial Court did not grant Mother's attorney's motion to withdraw until April 3, 2006. It does not appear that Mother's attorney was active in this case between the time the motion to withdraw was filed and when that motion was granted.

and was connected with the Court system and he wanted us to mediate the case to keep it from having to go in front of a Judge.

Mr. Raudenbush told me that [Father] had asked him to call me. Mr. Raudenbush told me he had mediated many disputes and thought he would be able to mediate the dispute between [Father] and myself.

I agreed to meet with [Father] and Mr. Raudenbush because I thought Mr. Raudenbush was connected with the Court system and it was necessary for me to do so.

I [initially] met with [Father] and Mr. Raudenbush . . . sometime before Christmas, 2005. This meeting took place in the courthouse in the lower level conference room.

I did not call my attorney or speak to him about this meeting or any other meeting set up by Mr. Raudenbush because I was told by Mr. Raudenbush not to do so.

At this meeting, [Father] and Mr. Raudenbush [began] calculating the child support [Father] said he owed. After they calculated it, it came up to only $12,000. We were there about two hours during this meeting and when they came up with the figure of $12,000, I disagreed with them and told them that figure was not correct and I would not agree to it. I then left.

Within a matter of days, Mr. Raudenbush [was] again calling me, telling me he wanted to set up another date to mediate this matter. I agreed to do this because I thought Mr. Raudenbush was part of the Court system.

We met again in the same room in the courthouse sometime between Christmas and New Year. At that time, Mr. Raudenbush and [Father] calculated that the child support that was owed was $8,750.00. Mr. Raudenbush told me that was the most I could get in child support according to his figures. I finally agreed to this because I thought Mr. Raudenbush was part of the Court system, that he had calculated the figures accurately and that was all I was entitled to. When I agreed to this amount, Mr. Raudenbush told me that I first had to write a letter to my attorney, telling him I no longer needed him. Mr. Raudenbush told me he had found a good attorney in Hixson, Tennessee, who could "finalize" the mediation. I then left the meeting with the understanding that I would be paid $8,750.00 plus [Father] would be responsible for paying the attorney fees and

> court costs once I had written a letter to my attorney dismissing him and went down to Hixson to "finalize" the mediation.

After the "Agreed Decree" was finalized and entered by the Court, Mother was in her former attorney's office discussing other matters, and he inquired about the resolution of this case. Then:

> When he asked me who the mediator was, I told him it was George Raudenbush. Mr. Alliman then told me what he knew about Mr. Raudenbush's background and it became clear to me that Mr. Raudenbush was not connected with the Court system at all but rather was a convicted felon.
>
> I believe Mr. Raudenbush and [Father] worked together to unfairly take advantage of me. [Father] owed more than $32,000 in child support at the time I filed the Petition. The only reason I agreed to settle the case for $8,750.00 plus attorney fees was because I thought Mr. Raudenbush was connected with the Court system and was trying to "mediate" the case in a fair, unbiased way. (original paragraph numbering omitted)

Attached to Mother's affidavit was the letter she sent to her attorney requesting that he withdraw from the case. This letter, which also was admitted at trial, was dated January 10, 2006, and provides as follows:

> In order to work out this matter of child support I had to write this letter to tell you I no longer need to retain you as attorney. But I [assure] you that I will pay you your fee in this matter. I will be getting in touch with you in a little while when we come to an agreement on this. I will need a bill made out to me.

Father responded to Mother's motion seeking to set aside the Agreed Decree. Although no affidavit or sworn testimony was filed, Father claimed in his response that the matter was mediated by an attorney in Hixson, Tennessee, named John Meldorf. Father added that this case was not mediated by George Raudenbush. Father claimed the Agreed Decree was properly signed by both parties and was properly tendered to and approved by the Trial Court.

Following a hearing in February 2007, the Trial Court entered an order setting aside the "Agreed Decree." According to the Trial Court:

> 1. The Agreed Decree and Permanent Parenting Plan entered therewith should be set aside in that at the time they were entered, Plaintiff was represented by Attorney Peter Alliman, who was not notified of the alleged mediation or meeting between

> [Mother, Father,] George Raudenbush and [Father's] attorney, John Meldorf.
>
> 2. The Court finds that George Raudenbush fraudulently represented himself to be part of the judicial system and conducted a fraudulent mediation.
>
> 3. The Court specifically finds that [Father] was able to pay child support at all times since October 5, 2001. A serious issue remains as to why he did not.
>
> It appearing to the Court that the parties have agreed that the minor children may remain in the custody of [Father] to attend school in Tellico, the Court acknowledges this agreement and so long as the children are living with the Father in Tellico and attending school, the Father is relieved of the obligation to pay One Hundred Fifty and No/100 Dollars ($150.00) per week as child support for the children. Should this arrangement change, and the Mother resume the position of primary residential custodian, the Father's obligation to pay child support shall be reinstated. It is specifically directed that the Defendant shall obey all previous Court Orders.[2]

The Trial Court then ordered the parties to conduct discovery in an attempt to ascertain the amount of child support that Father was in arrears.

After the parties conducted discovery and another hearing was held, the Trial Court entered a Final Judgment. Specifically, the Trial Court ordered Father to pay $17,375.00 in back child support and $4,740.00 for Mother's attorney fees.

Father appeals claiming that the Trial Court erred when, pursuant to Tenn. R. Civ. P. 60.02, it set aside the Agreed Decree that had been entered in January 2006. Mother also appeals, claiming that the amount of the judgment entered by the Trial Court is incorrect because the Trial Court improperly gave Father a credit for back child support for a period of time Father claims the children were living with him. Mother claims this was error because Father was under an existing order to pay child support and no petition to modify had been filed. Mother also requests payment of her attorney fees incurred on appeal.

Discussion

[2] The Trial Court did not order Mother to pay child support during the time that Father was to have physical custody of the children while they attended school in Tellico. There also does not appear to have been any formal change to the original permanent parenting plan which designated Mother as the primary residential parent. In any event, there are no issues raised on appeal by either party surrounding these particular matters.

The factual findings of the Trial Court are accorded a presumption of correctness, and we will not overturn those factual findings unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). With respect to legal issues, our review is conducted "under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts." *Southern Constructors, Inc. v. Loudon County Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001). Our standard of review as to a trial court's grant of a Tenn. R. Civ. P. 60.02 motion for relief from a judgment is set forth in *Henry v. Goins*, 104 S.W.3d 475 (Tenn. 2003), where our Supreme Court stated as follows:

> In reviewing a trial court's decision to grant or deny relief pursuant to Rule 60.02, we give great deference to the trial court. *See Underwood v. Zurich Ins. Co.*, 854 S.W.2d 94, 97 (Tenn. 1993). Consequently, we will not set aside the trial court's ruling unless the trial court has abused its discretion. *See id.* An abuse of discretion is found only when a trial court has "'applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining.'" *State v. Stevens*, 78 S.W.3d 817, 832 (Tenn. 2002) (quoting *State v. Shuck*, 953 S.W.2d 662, 669 (Tenn. 1997)). The abuse of discretion standard does not permit an appellate court to merely substitute its judgment for that of the trial court. *See Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001).

Henry, 104 S.W.3d at 479.

On appeal, we have not been provided a transcript of the trial testimony. Instead, Father filed a Statement of the Evidence pursuant to Tenn. R. App. P 24(c). The Statement filed by Father provides, in its entirety, as follows:

> 1. Transcript of deposition testimony of Attorney John Meldorf:
>
> The parties stipulated the admissibility of the deposition testimony of John Meldorf at the hearing of this matter. [Father] hereby incorporates the transcript verbatim herein as a true and exact record of Meldorf's testimony and asks the Clerk of the Trial Court to include said transcript, already on file, as part of the record for appeal.
>
> 2. Testimony of [Father]:
>
> [Father] testified in accordance with the deposition of Meldorf. Specifically, [Father] testified that Meldorf acted solely as a mediator in the case and did not represent [Father] in any capacity. [Father] testified that both parties participated of their own free will and that no misrepresentations were made by the mediator or by [Father].

> [Father] admitted that he was behind in child support, but disputed the actual amount of arrearage. He further testified that the deposition testimony by Attorney Meldorf accurately reflected what transpired at the mediation.
>
> 3. Testimony by [Mother].
>
> [Mother] testified at the hearing in accordance with her affidavit, signed by her on May 23, 2006, which was filed prior to the hearing in this matter. Instead of reprinting the affidavit in this Statement, [Father] adopts said affidavit and incorporates it by reference at this time. The testimony and affidavit by [Mother] was in sharp contrast to the testimony of [Father] and in sharp contrast to the deposition testimony of Attorney and Mediator John Meldorf.
>
> No further testimony of substance was offered by any other witness.

Mother objected to the Statement of the Evidence filed by Father, claiming, among other things, that it "fail[ed] to convey a 'fair , accurate and *complete* account of what transpired' . . . as required by Rule 24(c)." (emphasis in the original) Mother then filed her own Statement of the Evidence which was much more detailed. Father then amended his Statement of the Evidence stating that "he believes that [Mother's] statement provides a more complete statement and would hereby amend his original Statement of the Evidence by incorporating the mother's Statement of the Evidence by reference." The Statement of the Evidence eventually approved by the Trial Court provides as follows:

> On December 5, 2005, the Mother filed a Petition asserting the Father was approximately Thirty Thousand and No/100 Dollars ($30,000.00) in arrears on Court ordered child support payments. On January 26, 2006, the Court entered an "Agreed Decree" containing the signatures of both parties disposing of all issues between them, including the child support arrearage, which the Decree asserted was Eight Thousand Seven Hundred Fifty and No/100 Dollars ($8,750.00).
>
> On May 26, 2006, the Mother filed a Motion and Affidavit seeking to set aside the "Agreed Decree" pursuant to Rule 60.02(2) [of the Tennessee Rules of Civil Procedure]. The Father responded and a hearing was held on February 5, 2007. At the hearing, the Father's former attorney, John Meldorf, testified by deposition, which deposition was admitted as Exhibit 1 [at] the hearing. During the hearing, the Mother testified and a letter she had written to Attorney Peter Alliman was admitted into evidence as Exhibit 2. The Mother testified in accordance with the Affidavit she had earlier filed contemporaneously with her Motion to Set Aside Judgment filed May

26, 2006. After testimony of witnesses, including the parties and Attorney John Meldorf (by deposition), the Court found, in an Order entered April 18, 2007 that the alleged mediation that led to the agreement was "fraudulent"; that the Mother's attorney had not been notified of the alleged mediation and that the "Agreed Decree" should be set aside pursuant to Rule 60.02(2) of the TRCivP. These findings were based on the Mother's testimony which was consistent with her Affidavit; the testimony of the Father and the deposition of Attorney Meldorf. In this hearing, the Court also found the Father had been "able to pay child support at all times since October 5, 2001," and "a serious issue remains as to why he did not." This finding was based upon the Father's admission that he had been capable of paying child support, but had not done so.

At this time, the Court directed the parties to conduct discovery, set another hearing and "be prepared to show the amount of child support (the Father) claims to have paid since October 5, 2001 and the amount of support (the Mother) claims [is due]." At this time, the Court also ruled that the Father would "get credit for the time the children were in his physical custody." (Order entered February 5, 2007)

The next hearing was held June 8, 2007, at which both parties testified. It was undisputed that the Father was to pay child support to the Mother at One Hundred Fifty and No/100 Dollars ($150.00) per week beginning October 6, 2001 pursuant to the Court's previous Order. It was undisputed the Court had not modified this Order between October 6, 2001 and June 8, 2007.

The Mother testified that Father had paid only sporadically during the six year period and usually would only pay when she threatened court action. The Mother testified she remembered receiving four checks from the Father listed as follows:

Oct., 2001	$ 5,000.00
Jan. 19, 2006	$ 8,750.00
12/06	$ 2,250.00
	$ 1,425.00
	$17,425.00

This included the amount paid by the Father growing out of the "mediation."

The Father testified he had paid more than the amount claimed by the Mother, but did not know how much more. He

admitted there was a substantial child support arrearage and he could have paid, but didn't because he became "tired" and "gave up." He produced a check for Three Hundred and No/100 Dollars ($300.00) dated February 21, 2006. (EX 3) The Father's primary claim was he was entitled to an offset for a period of time he claimed the children resided with him. The Mother disputed that the children resided with the Father for the times he claimed.

At this hearing, the parties introduced the following exhibits which were accepted into evidence. First was the Mother's calculation of arrearage which was admitted as Exhibit 1. Thereafter, the Mother also introduced Exhibit 2 which was a calculation of arrearage, showing a calculation for the times the Mother agreed the Father had the children in his custody. The Father introduced Exhibit 3, which was a check Father claimed to have sent to Mother for child support. In her later testimony, the Mother agreed the Father had given her this check and that the Father should receive credit for it. The Father then introduced collective Exhibit 4 which he claimed were notes of and a check stub relating to child support payments. The Father then introduced Exhibit 5, which he claimed was a record of counseling sessions for one of the children which also contained writing by the Father at the bottom of the Exhibit. Finally, the Father introduced Exhibit 6, which was a copy of the Mother's Exhibit 1 with the Father's calculation of what he claimed was the arrearage he owed.

The Mother claimed Father owed her for 295 weeks (10/06/01-6/8/07) at One Hundred Fifty and No/100 Dollars ($150.00) per week less the amount paid by the Father. The Mother acknowledged receiving the Seventeen Thousand Four Hundred Twenty Five and No/100 Dollars ($17,425) she originally testified about and also agreed she had received the other [$300.00] check claimed by Father. (EX 3). This check brought the total credit to Seventeen Thousand Seven Hundred Twenty Five and No/100 Dollars ($17,725.00). Mother's total claim as of June 8, 2007, including credits, was Twenty Six Thousand Five Hundred Twenty Five and No/100 Dollars ($26,525.00).

However, the Court only awarded Mother Seventeen Thousand Three Hundred Seventy Five Dollars and No/100 Dollars

> ($17,375.00)[3] because it gave the Father credit for the time periods the Mother agreed the Father had the children. The Final Judgment reflected this credit even though it was undisputed there had been no modification or reduction of the original One Hundred Fifty and No/100 Dollars ($150.00) per week child support Order between October 6, 2001 and the date of the hearing. . . .

Against this backdrop, we first discuss Father's issue pertaining to whether the Trial Court erred when is set aside the Agreed Decree. In pertinent part, Tenn. R. Civ. P. 60.02 provides as follows:

> On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party . . . .

In *Rogers v. Estate of Russell*, 50 S.W.3d 441 (Tenn. Ct. App. 2001), this Court observed that:

> To set aside a judgment under Rule 60.02, the movant has the burden to prove that he is entitled to relief, and there must be proof of the basis on which relief is sought. *Banks v. Dement Const. Co.*, Inc., 817 S.W.2d 16, 18 (Tenn. 1991); *Federated Ins. Co. v. Lethcoe*, 18 S.W.3d 621, 623-624 (Tenn. 2000). A motion for relief from a judgment pursuant to Rule 60.02 addresses the sound discretion of the trial judge, and the scope of review on appeal is limited to whether the trial judge abused his discretion. *Banks*, 817 S.W.2d at 18. Rule 60.02 "was designed to strike a proper balance between the competing principles of finality and justice." *Id.*, *quoting Jerkins v. McKinney*, 533 S.W.2d 275, 280 (Tenn. 1976). Rule 60.02 "acts as an escape valve from possible inequity that might otherwise arise from the unrelenting imposition of the principle of finality imbedded in our procedural rules." *Id.*, *quoting Thompson v. Firemen's Fund Ins. Co.*, 798 S.W.2d 235, 238 (Tenn. 1990). Because of the importance of this "principle of finality," the "escape valve" should not be easily opened. *Id.*, quoting *Toney v. Mueller Co.*, 810 S.W.2d 145, 146 (Tenn. 1991). . . .

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[3] Based on these figures, the amount Mother claims was improperly credited to Father would equal $9,150.00 ($26,525.00 - $17,375.00 = $9,150.00). However, at oral argument counsel for Mother stated that the original amount of $26,525.00 was incorrect and should be $26,125.00. Thus, the correct amount of the alleged improper credit is $8,750.00 ($26,125.00 - $17,375.00 = $8,750.00). When discussing the amount of the credit Father received, we will use the amount of $8,750.00 from this point forward.

Rogers, 50 S.W.3d at 444-45.

Father's primary argument concerns the deposition testimony of Attorney Meldorf ("Meldorf"), who Father acknowledges was his attorney.[4] In his deposition, Meldorf emphasized that he informed Mother of her right to have counsel and informed her that she could contact attorney Alliman if she felt the need to do so. Meldorf also was careful to confirm that Mother was not represented by counsel as this would prohibit him from communicating with Mother. According to Meldorf, Mother declined this invitation and proceeded with the settlement approval.

At the outset, it is important to note that no one claims that Meldorf did anything inappropriate. The fraudulent conduct primarily was that of Raudenbush. The Trial Court specifically found that "George Raudenbush fraudulently represented himself to be part of the judicial system and conducted a fraudulent mediation." It was after this "fraudulent mediation" that the terms of any alleged agreement were incorporated into legal documents prepared by Meldorf. The Trial Court set aside the Agreed Decree based upon a finding that Raudenbush, not Meldorf, had acted fraudulently. In his brief, Father does not direct this Court to any testimony by Raudenbush explaining what he claims to have happened or otherwise putting at issue this specific factual finding by the Trial Court. Meldorf's proper behavior in no way negates the prior fraudulent conduct of Raudenbush which significantly impacted Mother's assent to the terms of the Agreed Decree.

Father argues that Rule 60.02 requires that the fraud be committed by the "adverse party" and because Raudenbush was not an adverse party, the Agreed Decree should not have been set aside. The undisputed facts show that Raudenbush was a friend of Father and Raudenbush attempted to "mediate" this case at the request of Father. Given these facts, we think the Trial Court implicitly found that Father was aware of at least some and perhaps all of the misrepresentations made by Raudenbush. While Father denied making any misrepresentations or engaging in fraudulent misconduct, whether or not he was aware of Raudenbush's fraudulent conduct was a question of fact. The Trial Court obviously credited the testimony of Mother over that of Father. In *Wells v. Tennessee Bd. of Regents*, our Supreme Court observed:

> Unlike appellate courts, trial courts are able to observe witnesses as they testify and to assess their demeanor, which best situates trial judges to evaluate witness credibility. *See State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990); *Bowman v. Bowman*, 836 S.W.2d 563, 566 (Tenn. Ct. App. 1991). Thus, trial courts are in the most favorable position to resolve factual disputes hinging on credibility determinations. *See Tenn-Tex Properties v. Brownell-Electro, Inc.*, 778 S.W.2d 423, 425-26 (Tenn. 1989); *Mitchell v. Archibald*, 971 S.W.2d 25, 29 (Tenn. Ct. App. 1998). Accordingly, appellate courts will not re-evaluate a trial judge's assessment of witness credibility absent clear and convincing evidence to the contrary. *See Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d

[4] We emphasize this only to show that Meldorf was not acting in the role as an unbiased third-party mediator.

315, 315-16 (Tenn. 1987); *Bingham v. Dyersburg Fabrics Co., Inc.*, 567 S.W.2d 169, 170 (Tenn. 1978).

Wells v. Tennessee Bd. of Regents, 9 S.W.3d 779, 783 (Tenn. 1999).

There is no clear and convincing evidence contrary to the credibility determination made by the Trial Court. It necessarily follows that the Trial Court did not abuse its discretion when it granted Mother's request for relief pursuant to Tenn. R. Civ. P. 60.02.

We next consider the issue raised by Mother that the Trial Court erred when it gave Father a credit against child support arrears based on the amount of time the children were living with Father when, during that same time period, there was no pending petition to modify child support. Relevant statutory law prohibits retroactive modification of a child support order in the absence of a petition to modify. Specifically, Tenn. Code Ann. § 36-5-101(f)(1) provides as follows:

> Any order for child support shall be a judgment entitled to be enforced as any other judgment of a court of this state, and shall be entitled to full faith and credit in this state and in any other state. *Such judgment shall not be subject to modification as to any time period or any amounts due prior to the date that an action for modification is filed and notice of the action has been mailed to the last known address of the opposing parties*. If the full amount of child support is not paid by the date when the ordered support is due, the unpaid amount is in arrears, shall become a judgment for the unpaid amounts, and shall accrue interest from the date of the arrearage, at the rate of twelve percent (12%) per year. All interest that accumulates on arrearages shall be considered child support. Computation of interest shall not be the responsibility of the clerk. (emphasis added)

The statute is clear that retroactive modifications of child support obligations are improper. When Tenn. Code Ann. § 36-5-101(f)(1) was passed, "the courts of this state [lost] their ability to forgive past arrearages in child support cases (but not the discretion to determine how and when the past due amounts were to be paid)." *Rutledge v. Barrett*, 802 S.W.2d 604, 606 (Tenn. 1991). *See also In re T.K.Y.*, 205 S.W.3d 343, 356 (Tenn. 2006) ("a trial court may not grant retroactive relief from a child-support order, even upon equitable grounds, because of a statutory revision making child-support orders final judgments not subject to modification.") (citations omitted).

In light of the unequivocal language of Tenn. Code Ann. § 36-5-101(f)(1), we hold that the Trial Court erred when it reduced Father's child support arrearages when no petition to

modify had been filed.[5] We, therefore, modify the final judgment so as to grant a judgment to Mother of $26,125.00, plus interest as set forth in the statute.

The final issue is Mother's request for payment of her attorney fees incurred on appeal. Tenn. Code Ann. § 36-5-103(c) provides as follows:

> The plaintiff spouse may recover from the defendant spouse, and the spouse or other person to whom the custody of the child, or children, is awarded may recover from the other spouse reasonable attorney fees incurred in enforcing any decree for alimony and/or child support, or in regard to any suit or action concerning the adjudication of the custody or the change of custody of any child, or children, of the parties, both upon the original divorce hearing and at any subsequent hearing, which fees may be fixed and allowed by the court, before whom such action or proceeding is pending, in the discretion of such court.

The provisions of Tenn. Code Ann. § 36-5-103(c) also apply to attorney fees incurred on appeal. *See Smith v. Smith*, No. M2003-02033-COA-R3-CV, 2005 WL 1384896, at *13 (Tenn. Ct. App. June 10, 2005), *perm. app. denied Dec. 19, 2005*. We believe this is a case when an award of attorney fees incurred on appeal is appropriate. Accordingly, this case is remanded to the Trial Court for: (1) a determination of the reasonable attorney fees incurred by Mother on appeal; and (2) a calculation of the amount of statutory interest due pursuant to Tenn. Code Ann. § 36-5-101(f)(1), *supra*.

Conclusion

The judgment of the Trial Court is modified so as to grant a judgment to Mother of $26,125.00 plus statutory interest, and is affirmed as modified. This cause is remanded to the Trial Court for further proceedings consistent with this Opinion and for collection of the costs below.

[5] We note that Father does not argue that, if the Trial Court improperly gave him a credit, the total amount of $26,125.00 is not the correct amount of arrears. We further note that our decision does not affect the Trial Court's ruling that because the children were living with Father so they could attend school in Tellico, Father does not have to pay child support from that point forward until such time as the children return to Mother's primary care. Because the parties agreed to such an arrangement in open court, which the Trial Court accepted and later incorporated into its order, we will treat this ruling as the granting of a motion to temporarily modify child support while the children are living with Father.

Costs on appeal are taxed to the Appellant, Charles Scotty Morgan, and his surety, for which execution may issue, if necessary.

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D. MICHAEL SWINEY, JUDGE